CHAPTER 35

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149, mostly codified at 38 U.S.C. §§ 4301-4333.

B. Practices and Procedures for Appeals Under The Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, 5 CFR Part 1208 (2000)

C. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces, 32 C.F.R. Part 104 (2000).

D. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (10 Sep 95).

E. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (1999).

F. Note, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, The Army Lawyer, December 1996, at 22.

G. Note, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Act*, The Army Lawyer, September 1997, at 47 [Appendix A].

H. Note, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, The Army Lawyer, December 1997, at 30.

I. Note, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, The Army Lawyer, February 1998, at 33 [Appendix D].

J. Note, *Jury Trials for USERRA Cases*, The Army Lawyer, June 1998, at 15.

K. Note, *How Do You Get Your Job Back?* The Army Lawyer, August 1998, at 30.

L. Note, *The 1998 USERRA Amendments*, The Army Lawyer, August 1999, at 52.

II. OVERVIEW.

A. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?

B. What are the protections granted by USERRA?

C. How are the USERRA protections enforced if an employer doesn't comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal government, state governments, all private employers. No exemption for small size, etc.

2. Overseas employees working for American controlled businesses or the federal government, including NAFIs such as AAFES, are now covered by the USERRA. See 38 USCA Sections 4303(3) and 4319 (1999), and 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.103).

3. Even a temporary job may get USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." Burden is on employer to prove that the job was not permanent. Temporary Federal appointments are suspended during term of military service, and resume with reemployment. 5 CFR 353.103 (a)

4. Certain Federal employees may be excluded from active duty and maintained in the Standby Reserve, if they are designated "key employees" under DoD Directive 1200.7, Screening the Ready Reserve, (6 Apr 84), and AR 135-133, Ready Reserve Screening, (10 Jul 89). ***See Dew v. United States***, 1998 WL 159060 (S.D.N.Y. 1 Apr. 98) (FBI policy that no Special Agents may serve in the Ready Reserve because of a "blanket" key employee designation. Suit under USERRA dismissed for failure to exhaust administrative remedies), *affirm'd, on other grounds*, 192 F.3d. 366, 1999 U.S. App. LEXIS 23710 (2d Cir. 28 Sep. 99) (FBI agents are intelligence agency employees under 38 USC 4325, and thus are not able to sue in federal court, and have no right to judicial review of agency USERRA decisions). ***See also Thomsen v. Dep't of the Treasury***, 169 F.3d 1378 (Fed. Cir. 5 Mar. 99) (Reservists have no right to be a member of the Selected Reserve, and may be required to serve in the Standby Reserve if designated "key employees").

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice: it doesn't require that notice be written; written notice, however, will minimize proof problems. See Appendix B, USERRA Employer Notice Letters.

2. Notice may be given by the soldier or by a responsible officer from the soldier's unit.

3. Exceptions: "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. Soldier should give notice as soon as possible.

C. Employee's period of military service cannot exceed five years [Appendix B].

1. Five year limit on military service is cumulative.

2. The five-year clock restarts when employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five year calculation.

4. Five year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from old VRR law's four year service calculations.

D. **Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.** For service of 31 (or more) days, employer can demand proof of honorable conditions. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. Employee must report back or apply for reemployment in a timely manner.

1. If service up to 30 days, must report at next shift following safe travel time plus 8 hours (for rest).

2. If service 31 days to 180 days, must report or reapply within 14 days.

3. If service 181 days (or more), must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that you formerly worked there, are returning from military service, and request reemployment pursuant to USERRA. The request need not be in writing. Written request for reemployment, however, will avoid proof problems. ***See Mc Guire v. United Parcel Service, Inc.***, 1997 WL 543059 (N.D. Ill. 1997) (unpub.), *aff'd*., 152 F.3d. 673 (7th Cir. 1998).

6. A soldier who fails to comply with USERRA's timeliness requirements doesn't lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. PROTECTIONS AFFORDED BY THE STATUTE. [38 U.S.C. §§ 4311-18.] IF THE EMPLOYEE MEETS THE FIVE REEMPLOYMENT PREREQUISITES DISCUSSED ABOVE, THE EMPLOYEE IS ENTITLED TO **SEVEN** BASIC ENTITLEMENTS**: PROMPT REINSTATEMENT; STATUS; ACCRUED SENIORITY; HEALTH INSURANCE COVERAGE; TRAINING, RETRAINING, OR OTHER ACCOMMODATIONS; AND SPECIAL PROTECTION FROM DISCHARGE (EXCEPT FOR CAUSE)**. NOTE THAT THESE REQUIREMENTS APPLY TO ALL EMPLOYERS: BOTH PUBLIC (FEDERAL, STATE, & LOCAL) AND PRIVATE. UNLIKE MANY OTHER FEDERAL LAWS, THERE IS NO "SMALL COMPANY" EXCEPTION.

A. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.

B. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. "Assistant Manager" is not the same as "Manager," even if both given the same pay.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

4. Civilian flight instructor assigned non-flight duties upon his return from Reserve active duty, upon RIF action which abolished his position, made nonfrivolous complaint that he was not assigned to a position of "like status and pay". See *Groom v. Dep't of Army,* 82 M.S.P.R 221 (1999); *Rogers v. Dep't of Army*, 82 M.S.P.R. 670 (1999); *Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 516 (1996); and 5 C.F.R. Section 353.209(a).

C. **Seniority.** If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to same "or like" job (status and pay), at employer's option, plus seniority [See Appendix C].

2. Seniority applies to pension plans as well (including TSP for Federal employees). The seniority principle protects the employee for purposes of both vesting and amount of pension.

   a. If employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrual pension depends on % of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.

c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. No interest may be charged by employer. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part1620, as amended by interim rule published 60 F.R. 19990 (21 Apr. 95), and final rule published 62 F.R. 18234 (14 Apr. 97). See also 64 F.R. 31052 (9 Jun 99) (new TSP loan policy for employees returning from military duty) (to be codified at 5 C.F.R. Part 1620, Subparts E and H)[See Appendix I--Federal Employee Reemployment Benefits.]

D. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

2. USERRA provides for continued employer health coverage, at the option of the employee, during the military service. [Federal employees should refer to 5 C.F.R. Part 890 (1999); see also 64 F.R. 1485 (11 Jun 99).]

   a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: CHAMPUS does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

   b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium.

E. **Training, Retraining, and Other Accommodations.** An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

F. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. For service 181 days (or more), the subsequent protection lasts a year.

2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.

3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.

4. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or **any other benefit of employment** because of military service.

a. Not only are current Active and Reserve Component military members covered by this provision, but so are former members--veterans. **See *Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996). Neither widows nor spouses of prior service members are covered by the USERRA anti-discrimination provision. *Lourens v. MSPB*, 193F 3d. 1369, 1999 U.S. App. LEXIS 25515 (Fed. Cir. 13 Oct. 1999).

b. There is no exhaustion of administrative remedies requirement to receive relief under USERRA before the MSPB. *Roche v. MSPB*, 1998 U.S. App. LEXIS 1775 (Fed. Cir. 1998) (unpub.). However, if a federal employee chooses to seek DOL assistance by filing a complaint with the Secretary of Labor UP 38 USC Section 4322, the employee must wait until the completion of that process before requesting relief from the Board. See *Milner v. Dep't of Justice*, 77 M.S.P.R. 37, 46-47 (1997) and 38 USC Section 4324(b).

c. Employers cannot require someone to use vacation time/pay for military duty [§ 4316(d)]. **See** Veterans' Benefit Improvement Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (9 Oct. 96), and ***Graham v. Hall-McMillen Company, Inc.***, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

d. An agency cannot treat employees who are absent because of military leave like those employees who are non-military leave of absence when the result is to deny Reserve employees any legally required benefits, including promotions or lateral assignments the employee would prefer and had seniority over other employees, e.g., a change from night to day shift. *Allen v. U.S. Postal Service*, 142 F.3d. 1444 (Fed Cir. 1998).

e. Employers may not take adverse action against anyone (not just the military employee) because that person takes action to enforce rights under USERRA or testifies or assists in a USERRA action or investigation.

f. Employees may use a USERRA claim as an affirmative defense against an agency in challenging an adverse action before the MSPB UP 5 USC Section 7701(c)(2)(C). *Yates v. MSPB*, 145 F.3d. 1480, 1484 (Fed. Cir. 1998) and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). The theory is that any agency adverse action that fails to address an employee's military status under USERRA is "an agency decision not in accordance with the law". See also *Bodus v. Dep't of Air Force*, 82 M.S.P.R. 508 (1999), and *Metzenbaum v. Dep't of Justice*, 82 M.S.P.R. 700 (1999) (Where there is an independent appealable action for MSPB jurisdiction and a USERRA claim, the USERRA claim is an affirmative defense to the action).

g. Such a defense may be implied by the factual record, without the claimant having to expressly mention USERRA in his/her complaint to the MSPB. *Yates*, supra; *Roberson v. U.S. Postal Service*, 77 M.S.P.R. 569 (1998); *Jasper v. U.S. Postal Service*, 73 M.S.P.R 367 (1998); *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999); and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). All a claimant must allege to make an implied prima facie case of discrimination under USERRA is:

(1) Allegation that he performed duty in a uniformed service of the United States.

(2) That he was denied a benefit of employment

(3) That the benefit was denied upon the basis of his duty performance in the uniformed services.

h. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. **See** ***Robinson v. Morris Moore Chevrolet,*** 974 F. Supp. 571 (E.D. Tex. 1997); ***Gummo v. Village of Depew,*** 75 F.3d 98 (2d Cir. 1996); ***Novak v. Mackintosh,*** 919 F. Supp. 870 (D.S.D. 1996); ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443 (N.D. Miss. 1996); ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996); and ***Hanson v. Town of Irondequoit***, 896 F. Supp. 110 (W.D. N.Y. 1995). Such cases are proven by direct evidence of discrimination (*Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367, 370-371 (1998)) or by indirect circumstantial evidence of discrimination (***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 93-94 (1997)). The administrative judge must so inform a claimant of the two methods of proof, and provide him time to develop the record. *Jasper*, supra at 371; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

i. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. ***Chance v. Dallas County Hospital District***, 1998 WL 177963 (N.D. Tex. 6 Apr. 98) (unpub.), *aff'd,* 176 F.3d 294 (5th Cir. 1999).

j. Military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. **See** ***Petersen v. Dep't of Interior,*** 71 M.S.P.R 227 (1996).

G. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. For federal employees, see 64 F.R. 31485, 31487 (11 June 1999), to be codified at 5 C.F.R. Section 353.106c.

1. Examples: ESOP, disability coverage, low cost life insurance, Christmas bonus, holiday pay, etc. [Appendix H for Federal Thrift Savings Plan].

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

3. The employee may waive the right to these benefits if the employee states, in writing, that he/she does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he "change his mind" and seek reemployment.

V. ASSISTANCE AND ENFORCEMENT. [GENERALLY, 38 U.S.C. §§ 4322-24].

A. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590). DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: http://www.ncesgr.osd.mil

B. **The Veterans' Employment and Training Service (VETS) (1-202-219-9110).** Department of Labor agency. Primary responsibility to formally investigate claims of USERRA violations. Website: http://www.dol.gov/dol/vets/. The Office of Special Counsel has responsibility to represent federal employees before the MSPB on USERRA violations, if they do not elect private counsel or desire to represent themselves. Website: http://www.access.gpo.gov/osc/.

1. If the VETS investigation establishes a violation probably occurred, VETS will refer the case to the Office of Special Counsel (OSC - employer a federal executive agency) [Appendix F] or Department of Justice (DOJ) for other employers. See also 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.210) (DOL-VETS will assist federal employees with USERRA complaints, and when asked, refer such cases to the OSC for MSPB representation).

2. National Guard technicians do not have the right to appeal reemployment rights claim decisions made by their State Adjutant General to the MSPB, but may file complaints directly with the federal court. See 38 USCA 4323 (1999) and 64 F.R. 31485, 31487 (11 June 99) (to be codified at 5 C.F.R. Section 353.211). As the result of recent Eleventh Amendment cases and amendment of 38 USC 4323 [Appendix J], National Guard technicians may only sue their states under USERRA through the DOL-VETS and the U.S. Department of Justice. **Cf.** *Larkins v. Dep't of Mental Health*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. 1999).

3. The OSC or AG may provide counsel for representation free of charge. If they do not, the individual may hire private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers). MSPB regulation providing for USERRA case attorney fee awards is at 62 F.R. 17046 (9 Apr. 97) (to be codified at 5 C.F.R. § 1202.202(a)(7)) and 63 F.R. 41177 (3 Aug. 98).

4. The MSPB has recognized that it has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. **See also *Petersen v. Dept of Interior***, 71 M.S.P.R. 227 (1996); ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86 (1997); ***Botello v. Dep't of Justice***, 76 M.S.P.R.117 (1997); ***Jasper v. U.S. Postal Service***, 73 M.S.P.R. 367 (1997) [probationary employee]; ***Wright v. Dep't of Veteran's Affairs***, 73 M.S.P.R. 453 (1997) [probationary employee]; ***Roberson v. U.S. Postal Service***, 77 M.S.P.R. 569 (1998)[probationary employee]; and *Yates v. MSPB*, 145 F.3d 1480 (Fed. Cir. 1998) [probationary employee]. For purposes of USERRA complaints, a federal employee does not need to meet the one year of current continuous service as a preference eligible employee under 5 USC Section 7511(a)(1)(B), to have jurisdiction before the MSPB. *Yates*, supra; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

5. There are no time limits for individuals to file USERRA discrimination claims before the MSPB, notwithstanding prior MSPB policies. 5 CFR 1208.12 (2000), Watkins v. USPS, 85 MSPR 141 (2000).

6. The 1998 Amendments to USERRA [Appendix J] provided at 38 USC Section 4324(c) that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994"[Day before USERRA enacted]. The MSPB has interpreted this provision not to create any retroactive application of USERRA to pre-USERRA cases, but rather to allow the MSPB to hear and the OSC to represent federal employees in VRRA (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. *Williams v. Dep't of Army*, 83 M.S.P.R. 109 (1999) and *Venters v. U.S. Postal Service*, __M.S.P.R. __, 1999 MSPB LEXIS 1304 (21 Sep. 1999).

7. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." **See also** AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases.

8. The USERRA adds several new "teeth" to the enforcement of reemployment rights.

   a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

   b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgement interest), attorney's fees, and litigation costs. **See** 62 F.R. 17046 (9 Apr. 97), to be codified at 5 C.F.R. § 1201.202(a)(7), and ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 446-447 (N..D. Miss. 1996).

   c. Employees who can demonstrate that reinstatement is not a viable remedy may seek “front pay” damage remedies. **See *Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443-446 (N.D. Miss. 1996).

VI. CONCLUSION.

- **DOL Non-Technical Guide to the USERRA - Appendix C.**
- **NCESGR Handouts on USERRA - Appendix E.**

APPENDIX A

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed. The new Title 10 section numbers are noted in italics and underlined.

2. The term "Reservist" means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

3. State call-ups of National Guard members are not protected under USERRA.

4. The symbol "§" means "section."

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §270(a) *(10147)*----------regularly scheduled inactive duty training (drills) and annual training.

10 U.S. C. §270(B) & (c) *(10148)*----------ordered to active duty up to 45 days because of unsatisfactory participation.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

32 U.S.C§502(a)----------NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C.§503----------NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C.§672(a) *(12301(a))*----------involuntary active duty in wartime.

10 U.S.C.§672(g) *(12301(g))*----------retention on active duty while in a captive status.

10 U.S.C.§673 *(12302)*----------involuntary active duty for national emergency up to 24 months.

10 U.S.C.§673b *(12304)*----------involuntary active duty for operational mission up to 270 days.

10 U.S.C.§673c *(12305)*----------involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C.§688----------involuntary active duty by retirees.

14 U.S.C.§331----------COAST GUARD involuntary active duty by retired officer.

14 U.S.C.§332----------COAST GUARD voluntary active duty by retired officer.

14 U.S.C.§359----------COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C.§360----------COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C.§367----------COAST GUARD involuntary retention of enlisted member.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

14 U.S.C.§712----------COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt form the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions --4312(c)(4)(C)

Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code Section 673b *(12304)* is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §673b *(12304)*. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5 year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15----------NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C.§§3500/8500 *(12406)*------ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

APPENDIX B

REEMPLOYMENT POSITIONS UNDER USERRA

IF PERIOD OF SERVICE WAS FOR LESS THAN 91 DAYS

1. Escalator Position

   if not qualified for this position after reasonable effort then

2. Position Held at Beginning of Service

   if can't become qualified for position 1 or 2 with reasonable effort then

3. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

IF PERIOD OF SERVICE IS MORE THAN 90 DAYS

1. Escalator Position or

2. Position of Like Seniority, Status and Pay

   if not qualified for either position 1 or 2 after reasonable effort then

3. Position Held at Beginning of Service or a Position of Like Seniority, Status, and Pay

   if not qualified for any of the above after reasonable effort then

4. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

PERSONS WITH SERVICE RELATED DISABILITY

1. Escalator Position (with reasonable accommodation)

   if not qualified for this position after effort to accommodate disability then

2. Any Other Position Equivalent in Seniority, Status, and Pay Qualified to Perform with Reasonable Effort

   if no such position exists or if not employed as above then

3. Nearest Approximation to Equivalent Position (consistent with person's circumstances with full seniority)

APPENDIX C

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans Employment and Training Service

April 1999

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive syatem, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute or the official USERRA Handbook.

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Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?{tc \l1 "Who's eligible for reemployment?}

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The new law provides an exemption for preservice positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

Advance Notice{tc \l1 "Advance Notice} (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations will be immune from court review.

Duration of Service{tc \l1 "Duration of Service} (Section 4312(c))

The cumulative length service that causes a person's absences from a position may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions{tc \l2 "Exceptions}. Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.
Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The recent U.S. military involvement in support of restoration of democracy in Haiti ("Uphold Democracy") was such an operational mission as is the current (as of 1998) operation in Bosnia ("Joint Endeavor").

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

<u>Disqualifying service</u> (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping a individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work{tc \l1 "Reporting back to work} (Section 4312(e))

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work day that would fall eight hours after the end of the calendar day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.
If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f)){tc \l1 "Documentation upon return (Section 4312(f))}

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation{tc \l2 "Unavailable documentation}. **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job{tc \l1 "How to place eligible persons in a job}

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. **Section 4313(a)(2)**. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

"Escalator" position{tc \l2 ""Escalator" position}. The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment{tc \l1 ""Prompt" reemployment}. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in Military Service{tc \l1 "Disabilities incurred or aggravated while in Military Service} Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims{tc \l1 "Conflicting reemployment claims} Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.

- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances{tc \l1 "Changed circumstances} Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship{tc \l1 "Undue hardship} Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons{tc \l1 "Rights of reemployed persons}

Seniority rights Section 4316(a){tc \l2 "Seniority rights Section 4316(a)}

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment must be accorded the service member.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. **Section 4316(b)(4)**. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans{tc \l2 "Pension/retirement plans}

Pension plans, **Section 4318,** which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay{tc \l2 "Vacation pay} Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, it continues to be the law that service members cannot be forced to use vacation time for military service.

Health benefits{tc \l2 "Health benefits} Section 4317

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge{tc \l2 "Protection from discharge}

Persons returning from active duty for training were not explicitly protected under the old law. Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more).

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not be protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation{tc \l1 "Protection from discrimination and retaliation}

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;

- promotion;

- reemployment;

- termination; and

- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law apply to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor ("VRR") law.

Reprisals{tc \l1 "Reprisals}

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.
- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statue. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded "a measure of weight" by the courts.

Veterans' Employment and Training Service{tc \l1 "Veterans' Employment and Training Service}. Reemployment assistance will continue to be provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates

complaints and attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions{tc \l1 "Government-assisted court actions}

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions{tc \l1 "Private court actions} **Section 4323(a).**

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(c)(1)(A)(iii). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(c)(2)(B). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(c)(4). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgements to determine potential claims of employees.

Service Member Checklist{tc \l1 "Service Member Checklist}

Service Member Obligations	Yes	No	Comments	Reference
1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)				Page 1
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?				Page 2
3. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)				Page 2
4. Was the service member discharged under conditions other than disqualifying under section 4304?				Page 4
5. Did the service member make application or report back to the pre-service employer in a timely manner?				Page 4
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?				Page 5
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.				Page 11

Employer Obligations{tc \l1 "Employer Obligations}

Employer Obligations:	Yes	No	Comments	Reference
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)				Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.				Page 11
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?				Page 6
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.				Page 9
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?				Page 5
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?				Page 2
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?				Page 8
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?				Page 7

9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?				Page 10
10. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?				Page 11
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute.				Page 13
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service.				Page 12
13. Did the employer satisfy the burden of proof where employment, reemployment or other entitlements are denied or when adverse action is taken when a service connection is the motivating factor in the denial or adverse action? Did the employer provide documentation that the action would have been taken in the absence of such membership?				Page 13

APPENDIX D

Office of the Special Counsel Considerations Regarding MSPB Representation

OFFICE OF THE SPECIAL COUNSEL & USERRA

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).

b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.

c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.

d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

a. 38 U.S.C. Section 4324(a)(1):

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

b. 38 U.S.C. Section 4324(a)(2)(A):

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

c. **38 U.S.C. Section 4324(a)(2)(B):**

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.

b. Reviews the entire investigative file in detail.

(1) Direct Evidence of Military Status Discrimination

(2) Circumstantial Evidence of Military Status Discrimination

A. Statements of Animus

B. Agency's Explanation

C. Disparate Treatment

D. Time Chronology

E. Conduct of the Veteran/Reserve Component Employee

c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor

d. Determines if further investigation is needed

e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played **a "substantial or motivating" part** in the agency's adverse action against the employee.

b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord,* Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)

c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.

(1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."

(2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting

analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a ***prima facie*** case that:

(1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,

(2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and

(3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran. Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).

b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.

c. One the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the adverse action.

d. Several types of information help the reservist or veteran prove his case:

(1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory

conduct may be found. *Accord*, Robinson v. Morris Moore Chevrolet, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103^{d} Cong., 1st Sess., at 30 (1993):

> [T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. ə 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

> This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103^{d} Cong., 1st Sess., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c) provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at http://www.access.gpo.gov/osc . You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, http://www.access.gpo.gov/mspb .

APPENDIX E

DoD National Committee for Employer Support of the Guard & Reserve (NCESGR) Materials for Service Members and Employers

USERRA Facts for Employers

Note: This material is for information only and should not be considered a legal authority. While this factsheet is directed to civilian employers of members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, please E-mail: NCESGR's WebMaster or call the National Committee at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38, United States Code, is provided in parentheses after the answer.

1. Is there a law governing a servicemember's right to reemployment rights after his or her completion of military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRR, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333)

2. Who is eligible for reemployment rights under USERRA following military service?

The individual must meet five conditions, or "eligibility criteria." The individual:
a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurrent period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
b. must have given written or verbal notice to the civilian employer prior to leaving the job for military training or service except when precluded by military necessity.
c. must not have exceeded the 5-year cumulative limit on periods of service.
d. must have been released from service under conditions other than dishonorable.

e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, Section 4312)

3. Are there reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state or territory involved. (Section 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of the uniformed service) must give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as they can. (Section 4312)

5. Is an employer entitled to proof that military duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority.
While USERRA does not address documentation of shorter periods of military service, if doubt exists, an employer could contact the employee's military command with questions about a specific period of service. (Section 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of military service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.
USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties).
b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.
c. Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt. (Section 4312)

7. Can an employee be required to use earned vacation while performing military service?

No. As under the VRR law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of military service happens to coincide with that period. (Section 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military service?

Although an exact amount of time is not specified in USERRA, an employee, at a

minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed.

10. After the completion of military service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the 8-hour period.

After a period of service of 31-180 days, the person must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service. (Section 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (Section 4312)

11. Does USERRA give a person the right to benefits from the civilian employer during a period of military training or service?

Yes. USERRA gives an employee the right to elect continued health insurance coverage, for himself or herself and his or her dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the

civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (Section 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (Section 4316)

12. What is an employer required to provide to a returning servicemember upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).
b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

13. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 days, the person is entitled to the job he or she would have attained absent the military service, provided the person is, or can become, qualified for that job. If

unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (Section 4313)

14. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If a person can't become qualified in the positions described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (Section 4313)

15. What if a returning servicemember is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service and is suffering from a disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

16. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an

employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:
"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (Section 4311)

17. Who has the burden of proof in discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (Section 4311)

18. Where do I go for information or assistance?

Employers should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed military duty by an employee-Reservist. For example, a scheduled drill weekend by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, NCESGR suggests employers contact the military commander involved

to seek relief from the impending hardship. Experience has shown that commanders are sensitive to employer concerns and can often assist, when military requirements permit, by rescheduling the proposed military duty or assigning someone else to perform it.

Ombudsman Services

National Guardsmen, Reservists, or their employers who experience problems resulting from employee participation in the National Guard or Reserve, may request assistance from one of NCESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

Each of the 54 ESGR committees have trained ombudsmen who are ready to assist in resolving employer-reservist conflicts. Most state committee ombudsmen are local business leaders; they understand both sides of the problem and can help mediate. State committee ombudsmen may be identified through unit commanders, state Adjutants General, or by calling the toll-free number below.

The first attempt to resolve a problem should be made at the employer-employee an atmosphere of mutual cooperation. If that fails, unit commanders should be consulted. Commanders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs.If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem and an address and telephone number where you can be reached.

For more information about ESGR Ombudsman Services, NCESGR's WebMaster
National Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: NCESGR's ombudsmen handle only employer-employee conflicts involving military service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor.

Employment and Reemployment Rights Questions and Answers for National Guard and Reserve Members

NOTE: This material is for information only and should not be considered a legal authority. While this factsheet is directed to members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

1. Is there a law governing reemployment rights after military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRR law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43.

2. Am I eligible for reemployment rights under USERRA if I perform military service?

Yes, provided you meet five conditions, or "eligibility criteria":

a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)

b. You must give notice to your civilian employer that you will be leaving the job for military training or service.

c. You must not exceed the 5-year cumulative limit on periods of service.

d. You must be released from service under "honorable conditions."

e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA doesnot apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state involved.

4. When is prior notice to my civilian employer required? How is such notice to be given?

It is necessary that the person who is performing the service (or an official representative of the uniformed service) give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of obligated service, generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties.

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions, contingencies, or military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of a mission, contingency, or military requirement is also exempt.

6. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under Title 5 U.S. Code. When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your military training or service. USERRA gives you the explicit right to do this.

If your employer is a state or local government that grants paid military leave, the result would be the same. Most states and many local governments do grant employees paid military leave. When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

7. Can I be required to use my earned vacation while performing military service?

No. As under the VRR law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

8. Now that USERRA has been enacted, can I serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits in the old law.

9. After military service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

11. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).
b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods

of service of 181 days or more, it is one year.

13. When I return from military duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.
A disability need not be permanent in order to confer rights under USERRA. For example, if you break your leg during your annual training, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or to place you in another position, until your leg has healed.

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

17. Where do I go for information or assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first consult with their command.

For assistance, contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor.

APPENDIX F

USERRA and Federal Thrift Savings Plans

Summary of Uniformed Services Employment And Reemployment Rights Act (USERRA) As It Pertains To Thrift Savings Plans (TSPs)

This reference guide and example are provided as clarification of **TSP Bulletin 95-13**. It is not intended to replace the bulletin. Please refer to TSP Bulletin 95-13 for more detailed information.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted on October 13, 1994, includes provisions to allow all eligible employees the opportunity to make up any Thrift Savings Plan (TSP) contributions that were not made to their TSP accounts because they separated (or were in a leave-without-pay status) to perform military service. TSP Bulletin 95-13 defines eligible employees as persons who separated (or entered in a leave-without-pay status) to perform military service and who were restored or reemployeed under Chapter 43 of Title 38, U.S.C. on or after August 2, 1990. Personnel offices may solicit self identification of employees in addition to automated methods to identify potentially eligible employees. When the employee has been identified, the personnel representative may make an appointment with him or her to explain the impact of USERRA. This is an opportunity to advise the employee of the amount of retroactive agency automatic 1% contributions. To assist the employee in making an informed decision, the personnelist may compute an estimate of retroactive employee contributions based on the employee's election.

Employees have until April 21, 1996 or one year from the date of reemployment, whichever is later, to submit a written request to the personnel office to make up the missed employee contributions, or their rights are forfeited. Agency Automatic 1% contributions should be forwarded to TSP by June 20, 1995. Belated submissions will continue to accrue lost earnings at the cost of the employing agency.

1. Employee Contributions: Eligible employees may choose to make retroactive contributions to their TSP accounts. Such contributions are made via payroll deductions from the employee's biweekly pay. The rate(s) of basic pay for the retroactive period must be furnished to employee's civilian payroll office. For the portion of the retroactive period when the employee did not receive a civilian salary, the rate of basic pay used to calculate TSP contributions, including the Agency Automatic 1%, is the basic pay to which the employee would have been entitled had he or she remained continuously employed. TSP Bulletin 95-13, Paragraph II.F., defines the retroactive period. Employees may change the amount of their contributions one time for each TSP Open Season during which they were eligible to participate, except that they were separated from civilian employment (or on LWOP) to perform military duty. An election to make a retroactive open season election is treated similarly to the error correction process. The fund allocations for all contributions must be identical to those indicated on the most current TSP-1.

2. Government Matching Contributions: Matching is available only to FERS employees if they choose to make retroactive contributions. If employees are currently contributing to TSP, government matching contributions will be invested in accordance with current allocations. Lost earnings will be paid on the retroactive government matching contributions (see paragraph 4 below).

3. Agency Automatic 1%: The personnel office is responsible for determining the retroactive period and for submitting corresponding basic pay rates to payroll. The personnel representative should find this information in the OPF. Payroll will submit the appropriate amount to the National Finance Center (NFC) to be invested in accordance with the current TSP-1.

4. Lost Earnings: A lost earnings record will be submitted by the employee's civilian payroll office for each pay period covered by the retroactive period. The TSP will calculate lost earnings on all retroactive agency contributions using the G-Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G-Fund rate of return until the first interfund transfer request was processed. Contributions subject to lost earnings will be moved to the investment funds indicated on interfund transfer requests and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period.

5. Forfeitures: If a FERS employee separated to perform military service before he or she was vested and thus forfeited agency automatic contributions, he or she is entitled to have these funds restored. It is incumbent on the employee to notify the personnel office of the forfeiture. TSP-5-R has been issued by TSP to be used to request restoration. Please refer to TSP Bulletin 95-18 for procedures to request restoration of forfeited funds.

6. Withdrawals: If the employee received an automatic cash out or was required to withdraw his or her TSP funds prior to March 1995, he or she may elect to reinvest the full amount of the withdrawal back into TSP. In certain cases, if a taxable distribution was declared on a TSP loan and the employee returns the amount of the withdrawal to the TSP, the taxable distribution that was declared on the loan may be reversed. In such a case, regular loan payments are resumed.

EXAMPLE #1:

In July 1991 TSP Open Season Mike submits a TSP-1 to contribute 3% of basic pay, allocating 100% to C-Fund. On October 1, 1991 Mike enters LWOP status to perform military duty. Mike returns to his civilian job March 12, 1992. At this time he resumes contributions at the 3% rate with 100% in the C-Fund. He has made no change since. On June 1, 1995 he is contacted by his employing agency and notified of his right to make retroactive contributions under USERRA.

--Mike has the opportunity to make retroactive contributions which will be based on the TSP-1 on file, at the 3% rate, 100% in the C-Fund. Mike will be entitled to the Agency Automatic 1% and Agency matching. Lost earnings will be calculated at the G-Fund rate of return only on the Agency Automatic 1% and on the Agency Matching Contributions. Retroactive contributions will be invested according to his current contribution allocation which is still 100% C-Fund.

--A TSP Open Season occurred during Mike's LWOP. Thus, he may submit a TSP-1 to change the amount of the contribution. However, the contributions will be invested according to

the allocations indicated on his current TSP-1. If, for example Mike wants to make retroactive contributions at 5% of Basic Pay (instead of 3%), this change would be effective the first full pay period in January and would end with the pay period prior to the first full pay period in July 1992. Effective with the July 1992 open season, Mike's contributions would return to 3%. (Reason: Mike had an opportunity to make an open season election in July 1992 yet remained at the 3% contribution level.)

--The personnel office should provide the payroll office with the period during which agency automatic 1% contributions are due. In this case that period of time begins on October 1, 1991 and terminates at the end of the pay period prior to the pay period in which Mike returned to duty. The personnel office should also provide the payroll office with the period during which agency matching contributions must be calculated. In the above example, the periods are from October 1, 1991 through December 1991, at 3% and January 1992 through June 1992, at 5%. Applicable salary rates should be provided for each period individually.

EXAMPLE #2

Pat is a CSRS employee contributing 2% of basic pay to TSP with 100% invested in the G-Fund. Pat is placed on LWOP in February 1994 to perform military service. He returns to duty in June 1994. In June 1995 Pat's employing office notifies him of his rights under USERRA.

--Pat may reinstate the TSP-1 election that was in effect in February 1994. As no open season occurred during Pat's leave, he does not have the option to change the contribution amount. He is locked into the 2% contribution rate. Pat is not entitled to the Agency Automatic 1% or the Agency Matching because he is covered under CSRS.

EXAMPLE #3

Debbie was first employed on October 1, 1992. November 1, 1992 she enters LWOP to perform military service. She remains on LWOP until she returns to her civilian position on June 2, 1993. During the July 1993 open season she enrolls in TSP for the first time.

--Debbie may not make retroactive contributions under the USERRA provisions. This is because she was not eligible to participate in TSP until the July 1993 Open Season.

EXAMPLE #4

Colette is a FERS employee who, prior to her separation on February 15, 1992 to perform military service, participated in TSP (5% of Basic Pay with 50% in the G-Fund and 50% in the F-Fund). Colette is reemployed on July 1, 1995 under Chapter 43 of Title 38, U.S.C.

--Immediately upon reemployment, Colette's agency will give her the opportunity to submit a Form TSP-1 to make current contributions. The fund allocation she requests will be the prospective investment allocation as well as the investment allocation for retroactive contributions. Within 60 days of becoming reemployed Colette's agency should advise her of her opportunity to make retroactive contributions. If she chooses to make retroactive payments, she is locked into the 5% contribution amount until her open season opportunity in July 1992. She can change the amount of her contribution for each open season during which she was separated in order to perform military service.

--The agency determines the retroactive period and the basic pay amounts on which the agency automatic 1% will be computed and submits this information to the civilian payroll office.

APPENDIX G
OPM News Release (1995): Benefits For Federal Employee Reservists Outlined

NEWS RELEASE

FOR IMMEDIATE RELEASE
December 28, 1995

CONTACT: Sharon J. Wells
(202) 606-1800, fax: 606-2264

BENEFITS FOR FEDERAL EMPLOYEE RESERVISTS OUTLINED

Washington, D.C.--Office of Personnel Management Director Jim King yesterday issued a notice to heads of Executive departments and agencies providing a summary of the rights and benefits of those federal employees who, as military reservists, are being called to assist in the international efforts in former Yugoslavia. This mobilization is called “Operation Joint Endeavor."

"The Federal Government is by far the largest single employer of members of the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis," said Director King.

The package contained specifics on the rights and benefits of federal civilian employees who perform active military duty including information on:

- Employee Assistance Programs (EAP's);
- pay;
- military leave;
- annual and sick leave;
- lump-sum leave payments;
- health benefits;
- life insurance;
- retirement; and,
- return to civilian duty.

On the last point, an employee on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.

"Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected," Jim King continued.

Agencies were urged to share the information with all affected employees as soon as possible.

Office of Personnel Management
Theodore Roosevelt Building
1900 E. Street, NW
Room 5F12
Washington, D.C. 20415-0001

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR
MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
FROM: JAMES B. KING, DIRECTOR
SUBJECT: Operation Joint Endeavor

Pursuant to section 12304 of title 10, United States Code, and Executive Order l2982 of December 8, 1995, the Secretary of Defense has delegated to the Secretaries of the Military Departments the authority to order to active duty Selected Reserve units and individual members not assigned to units for a period of up to 270 days to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."
The Federal Government is by far the largest single employer of members o£ the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis. Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected. Federal law provides many important rights and benefits for Federal employees who perform active military duty. An overview of these rights and benefits, including changes made necessary by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), is provided in attachment 1. I urge agencies to share this information with all affected employees as soon as possible.

USERRA generally requires an agency to place an employee entering the military on leave without pay unless the employee requests to be separated. Employees may also choose to be placed on military leave or paid leave, as appropriate. In any event, an employee entering on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.
Finally attachment 2 reminds agencies of their authority and obligation to provide certain premium pay benefits to civilian employees who perform emergency work in support of Operation Joint Endeavor.

Attachments

Attachment 1

EMPLOYEE RIGHTS AND BENEFITS OF FEDERAL CIVILIAN EMPLOYEES WHO PERFORM ACTIVE MILITARY DUTY

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty (or volunteer for active duty) are entitled to the following rights and benefits:

1. EMPLOYEE ASSISTANCE PROGRAMS(EAPs). Employee Assistance Programs can be very helpful to employees and their families in coping with the stress and disruption associated with a call to active military duty. EAP's provide short-term counseling and referral services to help with financial, emotional, and dependent care problems. These services are available to employees who have been called to active military duty (or who volunteer for such duty) and to employees who are family members of those who are performing active military duty. In addition, many EAP's offer services to family members of employees.

2. PAY. Employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or commission. They will now receive any compensation from their civilian employing agency unless they elect to use military leave, annual leave, or sick leave as described in paragraphs 3 and 4 below. As usual, agencies should continue the payment of annual premium pay for administratively uncontrollable overtime (AUO) work, availability pay for criminal investigators, regularly scheduled standby duty, or Sunday premium pay (when Sunday is part of the employee's regularly scheduled non-overtime civilian tour of duty) on days of military leave, annual leave, or sick leave.

3. MILITARY LEAVE. Employees who perform active military duty may request the use of paid military leave, as specified in 5 U.S C. 6323(a). Under the law, an eligible full-time employee accrues 15 calendar days of military leave each fiscal year, and any unused military leave at the end of the fiscal year (up to 15 calendar days) is carried forward for use in addition to the 15 days credited at the beginning of the new fiscal year. Part-time career employees accrue military leave on a prorated basis. Full-time employees may have up to 30 calendar days of military leave for use during a fiscal year. However, an employee who has more than 15 calendar days of unused military leave must use the excess amount of leave before the end of the fiscal year in order to avoid forfeiture. Employees who elect to use military leave will receive full compensation from their civilian position for each workday charged to military leave, in addition to their military pay for the same period.

Employees who perform active military duty in support of Operation Joint Endeavor may not be granted an additional 22 days of military leave under 5 U.S.C. 6323 (b) because that type of military leave is for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.

4. ANNUAL AND SICK LEAVE. Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit (under 5 U.S C. 6303 and 6304). and such requests must be granted by the agency. Requests for sick leave (under 5 U.S.C. 6307) may

be granted if appropriate under the normal requirements for such leave. In addition, requests for advanced annual or sick leave may be granted at the agency's discretion. Employees who use annual leave or sick leave will receive full compensation from their civilian position for all hours charged to annual or sick leave in addition to their military pay for the same period. Generally, employees do not earn annual or sick leave while in an extended nonpay status (e.g., LWOP for 2 weeks (80 hours) or more for most full-time employees)

5. LUMP-SUM PAYMENTS. Employees who enter into active military duty may choose (1) to have their annual leave remain to their credit until they return to their civilian position, or (2) receive a lump-sum payment for all accrued and accumulated annual leave. There is no requirement to separate from the civilian position in order to receive a lump-sum leave payment under 5 U.S.C. 5552.

6. HEALTH BENEFITS. Individuals performing active military duty under orders specifying a period of more than 30 days are provided medical and dental services, and their dependents are covered by care within an active military medical facility or the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). If an employee covered by the Federal Employees Health Benefits Program (FEHBP) is separated or placed in an LWOP status to perform military service, his or her health benefits enrollment continues for up to 18 months, unless elects in writing to have the enrollment terminated. If the FEHBP enrollment continues, the employee is responsible for paying the usual enrollee share of the premium for the first 12 months of absence for military duty and 102 percent o£ the full premium (Government and enrollee shares) for the final 6 months of continued coverage. However, employees may incur a debt during the first 12 months of such absence, rather than paying concurrently.

Termination. If an employee elects in writing to have the FEHBP enrollment terminated or if the enrollment automatically terminates after 18 months of separation or LWOP related to military duty, the employee and the covered family members have a 31-day temporary extension of coverage to convert to a non-group policy. These employees are not eligible for temporary continuation of coverage (TCC) at the end of the 18-month period of continued FEHEP coverage.

7. LIFE INSURANCE. If an employee is separated or placed in an LWOP status for reasons related to military service, his or her Federal Employees' Group Life Insurance (both basic and all forms of optional coverage) continues for up to 12 months at no cost to the employee. If the life insurance coverage is terminated after 12 months of such absence, the employee has a 31-day temporary extension of coverage for conversion to a non-group policy.

8. RETIREMENT. An employee who is placed in an LWOP status while performing active military duty continues to be covered by the retirement law--i.e., the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled for his or her civilian position during the LWOP and has the minimum amount of civilian service necessary for title to disability benefits (5 years for CSRS, 18 months for FERS), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS, subject to the normal rules for crediting military service.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee does not exercise the restoration right, but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the normal rules governing credit for military service. However, if an employee covered by CSRS is separated to enter active military duty during a period of war or national emergency as declared by Congress or proclaimed by the President, the employee is deemed not to be separated from his or her civilian position for retirement purposes, unless the employee applies for and receives a refund of his or her retirement deductions.

Thrift Savings Plan. For purposes of the Thrift Savings Plan (TSP), no contributions can be made, either by the agency or the employee, for any time in an LWOP status or for a period of separation. However, if employees are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic (1 percent) Contributions and, if they make up their own contributions, retroactive Agency Matching Contributions.

Also, if FERS employees separate and their Agency Automatic (1 percent) Contributions and associated earnings are forfeited because they did not meet the TSP vesting requirement, the employees are entitled to have these funds restored to their accounts after they are reemployed. In addition, if employees separate and their accounts are disbursed as automatic cashouts, the employees may return to the TSP an amount equal to the full amount of the payment after they are reemployed.

For more information, see TSP Bulletins 95-13, Implementation of the Uniformed Services Employment and Reemployment Rights Act of l994, and 95-20, Interim Regulations and Fact Sheet on Thrift Savings Plan Benefits Resulting from the Uniformed Services Employment and Reemployment Rights Act of 1994.

9. RETURN TO CIVILIAN DUTY. An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the following time limits:

(A) Employees who served less than 31 days must report back to work at the beginning of the next scheduled workday following their release from service and the expiration of 8 hours after a time for safe transportation back to the employee's residence.

(B) Employees who served more than 30 days, but less than 181 days, must apply for reemployment within 14 days of release by the military.

(C) Employees who served more than 180 days have 90 days to apply for reemployment. Employees who served less than 91 days must be restored to the position for which qualified that they would have attained had their employment not been interrupted. Employees who served more than 90 days have essentially the same rights, except that the agency has the option of placing the employee in a position for which qualified of like seniority, status, and pay.

Upon return or restoration, an employee generally is entitled to be treated as though he or she had never left for purposes of rights and benefits based upon length of service. This means that the employee must be considered for career ladder promotions, and the time spent in the military

will be credited for seniority, successive within-grade increases, probation, career tenure, annual leave accrual rate, and severance pay. An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.)

An employee performing active military duty is protected from reduction in force (RIF) and may not be discharged from employment for a period of 1 year following separation (6 months in the case of a Reservist called to active duty under 10 U.S.C. l2304 for more than 30 days but less than 181 days or ordered to an initial period of active duty for training of not less than 12 consecutive weeks), except for poor performance or conduct or for suitability reasons.

NOTE: Employees in the intelligence agencies have substantially the same rights. but are covered under agency regulations rather than the Office of Personnel Management's regulations and have different appeal rights.

10. APPEAL RIGHTS. An employee or former employee of an agency in the executive branch (including the U.S. Postal Service) who is entitled to restoration in connection with military duty may appeal an agency's failure to properly carry out the law directly to the Merit Systems Protection Board (MSPB), or the employee may first submit a complaint to the Department of Labor, which will attempt to resolve it. If resolution is not possible, the Department may present the case to the Office of the Special Counsel, which may represent the employee in an appeal to the MSBP. Appeals to the Board must be submitted within 30 calendar days after the effective date of the action being appealed.

11. DOCUMENTING PERSONNEL ACTIONS.

Leave without Pay. LWOP must be documented on an SF 50, Notification of Personnel Action, with nature of action 473/LWOP-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. (Note: ZJU is a new legal authority that has been established to enable OPM and agencies to identify reservists who are involved in the international effort under Operation Joint Endeavor.) These same two authorities must also be used on the 292/RTD action when the reservist returns to civilian employment.

Health Benefits and Life Insurance. For those reservists with health benefits coverage while absent for reasons related to military duty, enter in block 45 of the SF 5 0 remark B66:

> "Health benefits coverage will continue for 18 months unless you elect to cancel coverage You are liable for the employee share of the premiums for the first 365 days and for 102% of the full subscription charge after 365 days. Payment for coverage after 365 days must be made on a current basis; payment for the first 365 days may be made while you are absent or when you return."

For those reservists with Federal Employees' Group Life Insurance (FEGLI) coverage, enter in block 45 of the SF 50 remark B39:

> "FEGLI coverage continues for up to 12 months in a nonpay status."

Separations. If the reservist requests separation rather than LWOP, the separation must be documented with nature of action 353/Separation-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. Follow the instructions in Chapter 9 or 11 (as appropriate) of *The Guide to Processing Personnel Actions*, to document the reservist's restoration upon completion of his or her military service.

12. CONTACTS. For further information on employment rights and benefits of civilian Federal employees who perform active military duty, agencies should contact the following offices:
--For information on pay, military leave, and annual and sick leave, contact OPM's Compensation Administration Division, (202) 606-2858.
--For information on health benefits, life insurance, and retirement, contact the Insurance Officer or Retirement Counselor of your agency. Retirement Counselors may contact OPM's Agency Advisory Services Division, (202) 606-0788. Insurance Officers may contact the Office of Insurance Programs, Insurance Policy and Information Division, (202) 606-0191.
--For information on the Thrift Savings Plan, agency headquarters personnel offices may contact the Federal Retirement Thrift Investment Board, (202) 523-7507 Field installations should contact their headquarters TSP Coordinator for guidance.
--For information on return to civilian duty and appeal rights, contact OPM's Staffing Reinvention Office, (202) 606-0830.

--For information on documenting actions related to entering active military duty, contact OPM's Personnel Records and Systems Division. (202) 606-4415.

--For information on labor-management relations issues, contact OPM's Labor-Management Relations Division, (202) 606-2930.

Attachment 2

PREMIUM PAY FOR FEDERAL CIVILIAN EMPLOYEES WHO PERFORM EMERGENCY WORK IN SUPPORT OF OPERATION JOINT ENDEAVOR

The purpose of this attachment is to provide information about premium pay for civilian employees who perform emergency work in connection with "Operation Joint Endeavor." Agencies are reminded of their authority under the law (5 U.S.C. 5547(b)) and OPM regulations (5 CFR 550.106) to make exceptions to the bi-weekly maximum earnings limitation. (Please note that overtime pay under the Fair Labor Standards Act of 1938, as amended, does not count toward this limitation) When the head of an agency or his or her designee determines that an emergency posing a direct threat to life or property exists, an employee who is performing work in connection With the emergency must be paid premium pay under the annual limitation of GS-15, step 10, rather than the GS-15, step 10, biweekly limitation. However, law enforcement officers (LEO's) are covered by the higher biweekly limitation in 5 U.S.C. 5547(c) and are not covered by the authority to apply the annual limitation during emergencies.

OPM encourages agencies to exercise their authority in the case of employees (other than LEO's) who perform emergency work in connection with Operation Joint Endeavor. Agency heads are required to make a determination as soon as practicable and to make entitlement to premium pay under the annual limitation effective as of the first day of the pay period in which the emergency began. Questions may be referred to OPM' s Compensation Administration Division on (202) 606-2858.